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IN THE

Supreme Court of the United States

October Term, 1940.

No. [redacted] 38

WILLIAM S. LOVELL AND DOUGLAS GORDON LOVELL,

Petitioners,

Versus

DULAC CYPRESS COMPANY, LTD. AND J. M. BURGUIERES COMPANY, LTD.,

Respondents.

PETITION OF WILLIAM S. LOVELL AND DOUGLAS GORDON LOVELL FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

and

BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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ROBERT GILES,
Of Birmingham, Ala.
Of Counsel.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray issuance of a Writ of Certiorari to review the judgment of the Cicruit Court of

Appeals for the Fifth Circuit entered January 14, 1941 (R. 114) affirming a judgment of the United States District Court for the Eastern District of Louisiana (R. 79). Rehearing was denied by the Circuit Court of Appeals on February 12, 1941 (R. 140).

The opinion of the United States Circuit Court of Appeals above referred to has not as yet been reported.

STATEMENT OF MATTER INVOLVED.

Petitioners (citizens of Alabama and Maryland, respectively) sued respondents (citizens of Louisiana) in the Federal District Court of Louisiana for title to certain Louisiana lands, and for Twenty-four thousand ($24,000.00) Dollars as damages for timber cut therefrom by respondents. (R. 2-10). Federal jurisdiction was based upon the diversity of citizenship.

Plaintiffs claimed title under the tax redemption statutes of Louisiana (Act 41, La. Acts 1912, amending Sec. 62 of La. Act 170 of 1898; also Act 237, La. Acts of 1924) having redeemed the lands in question in 1938 (R. 11) from an 1895 adjudication or sale of the same to the State for nonpayment of taxes by plaintiffs' ancestors (R. 63). The claim for damages was based upon the defendants having trespassed upon and removed from the land large quantities of valuable timber during the *interim* between the aforesaid adjudication and redemption and while the title to the lands reposed in the State, subject, however, to the plaintiffs' right of redemption (R.

44, 68). The defendants interposed several defenses as to the claim for title (R. 13-21, 34-38), but the rulings of both the District Court and the Circuit Court of Appeals were favorable to petitioners in that regard, and are not sought to be reviewed here. Suffice it to say that petitioners were held to be the owners of the land by virtue of the redemption (R. 76). The principal defense to the action for damages was that the redemption was not retroactive as to the trespass, and that since the trespass and taking occurred while title to the land was in the State, plaintiffs were without right of action therefor.

The case was submitted to the District Court upon an agreed statement of facts (R. 44, 62) and although there was judgment for the plaintiffs for the title, it was against them as to damages (R. 79), which judgment was in all respects affirmed by the Circuit Court of Appeals, upon appeal and cross-appeal taken by petitioners and respondents, respectively.

In deciding the claim for damages adversely to petitioners, the Circuit Court of Appeals held that:

> "The owner then in retaking the property, except for subrogation to the State's liens for the taxes of 1894, retook it not as it was in 1895, but as it was in 1938 * * *"[1]

In so holding, the Circuit Court of Appeals not only failed to follow but diametrically opposed the pronouncement of the Court of Appeal of Louisiana (which is an intermediate state appellate court) in the case of *Johnson*

[1] All typographical emphasis throughout the petition and brief is supplied.

vs. Chapman, (La. App.) 179 So. 466, wherein that Court ruled:

> "The State having allowed plaintiff to redeem the property to which it held indefeasible title, *thereby restored the same to the owners as of the date of the sale, or their transferees.*"

Moreover, the holding of the Circuit Court of Appeals squarely conflicts with the only case considering this precise question of a redemptioner's recovery for *ad interim* trespass. *Elk Garden vs. Gerstell*, 95 W. Va. 471, 121 S. E. 569, 33 A. L. R. 298.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1935 (U. S. C. A. Title 28, Section 347), and under the decision of this Court in *Forsythe vs. Hammond*, 166 U. S. 506, 41 L. ed. 1095, and *Stoner vs. New York Life Insurance Company* (present term) .... U. S. ...., 85 L. ed. 275. This petition is presented within the time allowed by law, the judgment of the Circuit Court of Appeals having been entered on January 14, 1941, (R. 114) and a petition for rehearing having been filed within the delays allowed by law and having been denied on February 12, 1941 (R. 140).

QUESTIONS PRESENTED.

The foregoing presents the following questions for the consideration of this Court:

1. Whether the United States Circuit Court of Appeals must follow the decision of an intermediate state appellate court, upon a question of local law, in the absence of convincing evidence that the highest Court of the State would decide differently, where the intermediate decision has been first affirmed by the highest Court, and then the judgment later reversed solely because of a new finding as to a controlling fact.

2. Whether petitioners, under the law in general and that of Louisiana in particular, are entitled after redemption to reinbursement from respondents for having cut and sold standing timber from lands during the *interim* that title thereto was vested in the State by tax adjudication.

REASONS FOR ALLOWANCE OF CERTIORARI.

1. The Court of Appeals erred in deciding an important question of local law in a way conflicting with an applicable local decision.

2. The Court of Appeals erred in failing to recognize and apply the general and fundamental rules of law respecting redemption of property, and in holding that a tax redemptioner becomes the owner as of the date of the

redemption rather than as of the date of the tax sale, so as to preclude the redemptioner from the recovery of damages for trespass to the property while the title thereto was vested in the State, contrary to the only precedent exactly in point, it being important that such question be authoritatively settled in view of the volume of tax title litigation.

Wherefore, The premises considered, petitioners respectfully pray that the Writ of Certiorari issue to the Circuit Court of Appeals for the Fifth Circuit to revise its judgment aforesaid, and in that behalf respectfully submit the following brief and argument.

Respectfully Submitted,

JAMES Q. SMITH,
Attorney for Petitioners.
DAVID GERTLER and
ROBERT GILES,
Of Counsel.

BRIEF AND ARGUMENT.

I. Opinions Below.

The decision at first instance was that of District Judge Wayne G. Borah, filed February 29, 1940. It appears at page 79 of the record. The opinion of the Circuit Court of Appeals was written by Circuit Judge Hutcheson, with the concurrence of Judge McCord, and with Judge Sibley dissenting. It was filed January 14, 1941, has not as yet been reported and appears at page 114 of the record.

II. Jurisdiction.

The Court is respectfully referred to the jurisdictional statement at page 4 of the petition as to the basis for jurisdiction and timeliness of presentation.

III. Facts.

The facts are likewise summarized at page 2 of the petition. It will be noted that, by stipulation, the cause was submitted at first instance upon the questions of title and damages, "with the understanding that if the Court holds in favor of the plaintiffs that they have title to the land, and also have an action for trespassing as alleged in plaintiffs' petition, that thereafter the Court will pass upon the question of quantum of damages". (R. 44) Plaintiffs' title was recognized (R. 79) but their demand for damages rejected (R. 79, 77). The verified petition avers the value of the timber cut as being $24,000.00 (R. 7). The details of the claim for damages are not ex-

emplified by the record, not having been gone into pursuant to the stipulated submission. We respectfully emphasize that the sole reason for the rejection of the claim for damages was that "Since the State had absolute title to the property before plaintiffs exercised their right of redemption, the plaintiffs cannot recover damages for the timber removed during the period in which ownership was in the state." (R. 77). It is the affirmance of this ruling by the Court of Appeals, holding that plaintiffs retook the property "not as it was in 1895, but as it was in 1938", which we contend to be erroneous because of its conflict with the rule in the *Chapman* case, *supra*, and with the general jurisprudence on the subject.

ARGUMENT.

Summarization.

Federal Courts are bound to follow local decisions as to the effect of tax redemption. The Louisiana courts have held that such effect is the restoration of the property as of the date of the sale. Subsequent reversal of the judgment following this opinion because of a new finding of a single controlling fact leaves the principle of retrospection intact and binding on the Federal Court. The decision of the Circuit Court denying plaintiffs' damages conflicts with this principle of retrospection obtaining in Louisiana, and with the only decided case squarely in point upon *interim* trespass which premised recovery upon such principle. This conflict calls for authoritative settlement by this court.

Federal Courts are Bound to Follow Local Decisions as to the Effect of Tax Redemption of Land.

This petition presents for decision the single question of whether or not redemption from a tax sale of lands so relates back and vests in the redemptioner a retrospective title which would enable him to sue for a devastation of his property committed while title was in the State prior to redemption. *Ad valorem* systems of realty taxation being purely statutory and varying greatly among the different states, the question is obviously one of local law which, when raised in Federal Courts in litigation between citizens of different states, would have been ruled by local decisions even prior to *Erie Railroad vs. Tompkins*, 304 U. S. 64; 82 L. ed. 1188.

By several decisions at the present term, this Court has thoroughly established the law to be that "in cases where jurisdiction rests on diversity of citizenship, Federal Courts must follow the decisions of intermediate State courts in the absence of convincing evidence that the highest court of the state would decide differently."

Stoner vs. New York Life Insurance Company ..... *U. S.* .....; *85 L. ed. 275.*
West vs. American Tel. & Tel. Company ..... *U. S.* .....; *85 L. ed. 146.*
Fidelity Union Trust Company vs. Field ..... *U. S.* .....; *85 L. ed. 176.*
Six Cos. of Cal. vs. Joint Highway Dist. ..... *U. S.* .....; *85 L. ed. 159.*

(These cases are found in the L. ed. advance sheets, being Nos. 74, 44, 45, 32, and 267, respectively, at the present term.)

Therefore, if the Court of Appeal of Louisiana has decided that a redemption unqualifiedly restores the property to its owner as of the date of the sale, then the Circuit Court of Appeals was in error in holding that petitioner retook his property "not as it was in 1895, but as it was in 1938", and the conflict bespeaks allowance of certiorari by this Court.

In Louisiana, Redemption Restores the Property to the Owner as of the Date of the Tax Sale.

If this is a true principle, petitioners have a right to the damages claimed, as is further argued *infra*. And that such is the law of Louisiana has been declared by the Court of Appeal of that State.

In the case of *Johnson vs. Chapman, et al.*, (La. App.) 179 So. 466, decided in 1937, the land in question was adjudicated and sold to the state in 1922 for unpaid 1921 taxes. In 1928 and 1929, one Hamner purchased the land in successive tax sales by the State for the tax years 1927 and 1928, respectively. The plaintiff, Johnson, purchased an interest in the land from one of the co-owners in 1930, and then about 1934 he paid the 1921 taxes and redeemed from the sale therefor. Plaintiff sued J. D. Chapman (the other co-owner with plaintiff's grantor) and Hamner for title and possession, contending the tax sales to Hamner were void because of the fact that when

they were made (1927-1929) title was already in the State under the 1921 sale, from which sale he, the plaintiff, had redeemed.

The Court of Appeals, with reference to plaintiff's (Johnson's) redemption in 1934 for 1921 taxes, said:

> "The State having allowed plaintiff to redeem the property to which it held indefeasible title, *thereby restored same to the owners as of the date of the sale, or their transferees.*"

Thus it was squarely held that plaintiff (though actually redeeming after Hamner's deed) acquired the property as of 1922, (the date of tax sale, and prior to Hamner's deeds). Accordingly, petitioners' redemption restores their property as of 1895 rather than 1938. The holding of the Circuit Court of Appeals diametrically opposes this ruling.

In the *Johnson* case, *supra*, there was a review of the above decision of the intermediate appellate court by the Louisiana Supreme Court, on certiorari. On original submission, the above holding in favor of the plaintiff, *Johnson*, was affirmed, *Johnson vs. Chapman, et al.*, 190 La. 1034; 183 So. 289. However, upon rehearing and re-examination of the record, (190 La. 1034, 183 So. 289, 290) the Louisiana Supreme Court found that the 1921 taxes had in fact been paid when due by one H. G. Chapman, and therefore there had been no valid adjudication and sale to the State for non-payment of those taxes, and therefore the plaintiff, Johnson, could obtain no benefit from an attempted redemption from such void sale.

This left the adjudications for 1927-1929, under which Hamner claimed, valid, and accordingly the finding of the Court of Appeals against Hamner was reversed.[1]

This rehearing, based as it is upon a new finding of ultimate fact, would not affect the *legal principle* of retrospective operation of redemption laid down as above. It is well settled that:

> "The overruling of a decision as to one proposition of law, declared by it, does not argue unsoundness therein as to other and distinct propositions enunciated thereby."
>
> *21 C. J. S. 326, Par. 194* (citing cases).

Even less would a different finding of fact affect an announced legal principle.

It is true that the facts in the *Johnson* case are not identical with or even similar to those here involved. But the principle of restoration, of retrospective operation of redemptive title, is exactly the same, and is equally as determinative of the rights of the parties. This notion of retroactive operation and restoration of the *status quo ante* is the very essence of the redemption process, the element which distinguishes it from ordinary purchase and sale.

---

[1] The Supreme Court said, "The tax deeds to Hamner are attacked by the plaintiff only on the grounds that the State was vested with title at the date of the assessments.

"The Court of Appeal, Second Circuit, held that the tax sales made to Hamner were void and ordered them cancelled from the records, and, on original hearing, we affirmed that judgment.

"So far as the State having title in 1927 and 1928, when the property was assessed to H. G. Chapman and sold to W. L. Hamner, a review of the record conclusively shows that it had none.

"The District Court rendered judgment in favor of the defendants because the trial Judge found that, although the property had been adjudicated to the State in the name of D. Chapman for the unpaid taxes of 1921, the taxes had previously been paid for that year by H. G. Chapman."

The Circuit Court of Appeals recognized it solely for the purpose of subrogation of the redemptioner to the tax lien for 1894, according to the terms of the certificate of redemption. No mention was made of the *Johnson* case.

Neither the District nor Circuit Court cited a decision squarely in point in support of its holding. The Louisiana courts have never passed upon the question of retroactive redemption as warranting recovery for *interim* trespass. But the pronouncement of the Court in the *Johnson* case harmonizes with the general jurisprudence involved in the question, and this, especially in view of the fact that there is no decision denying such recovery (that counsel have been able to discover) is most persuasive to the point that, were the question presented to the Supreme Court of Louisiana, it would be ruled consistently with petitioner's contention.

The General Law is that a Redemptioner may Recover for Interim Trespass, Because of his Retrospective Title.

This is the necessary result implied by the inherent retrospective operation of the redemptive process. General authorities are consonant with the rule of the *Johnson* case.

Redemption has been defined as a defeasance of the tax sale with the owner's "revesting in himself a title as complete and unqualified as he had before the tax was assessed—".

26 R. C. L. 384, par. 427.

The Georgia court holds that "the redemption contemplated by the law was a restoration of the status existing before the sale—".

Elrod vs. Owensboro Wagon Co. 128 Ga. 361, 57 S. E. 712.

The only reported decision dealing with this question of *interim* trespass is the case of *Elk Garden Big Vein Coal Mining Company vs. Gerstell*, 95 W. Va. 471, 121 S. E. 569, 33 A. L. R. 298, wherein the Supreme Court of West Virginia in 1924 considered the precise question here presented and ruled it in favor of recovery. The question was recognized and treated as one of novel impression, and a unanimous court delivered a well-considered opinion which is accurately epitomized in the syllabus:

> "Where the title to a tract of coal owned by a corporation is forfeited to the State for the failure of the owner to have the same charged on the land books of the county wherein the coal lies for five successive years, and the former owner redeems the same, as provided by the statute, it becomes reinvested with its former title, said title is retrospective in character, and the corporation may maintain an action of trespass for the wrongful removal of said coal, though the trespass was committed while the title to said coal was vested in the State."

The Court said:

> "The most difficult question which arises in this case is the question raised on the objection to the filing of the special plea by the defendant, which plea sets up, as a defense, the fact that, at the time the alleged trespass complained of in the declaration

was committed, as therein alleged, the plaintiff was neither the owner of the said vein of coal, nor was it in possession of the same; that at the time the title to the said vein of coal was in the State of West Virginia, having been forfeited for non-entry on the land books of Mineral County; that the plaintiff failed to have the said vein of coal charged on the land books of said county from the year 1898 to the year 1922, and that by reason of non-entry the title to said Big Vein of coal was forfeited to, and became vested in, the State in 1903. We fail to find any decisions, either by this Court or the courts of other states, having similar statutes and holdings, which bear directly upon this question.

"As a general rule, the plaintiff, to maintain an action of trespass to real property, must be either in actual or constructive possession of the property trespassed upon at the time the trespass is committed, *Gillison vs. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763. The common-law rule is that the plaintiff must be in actual possession of the property at the time of trespass, but the modern authorities hold the rule as above stated. 'The plaintiff must possess the real estate at the time when the alleged injury occurred, as a rule, in order that he may maintain an action of trespass therefor. However, if he acquires the title after the injury, and the title is retrospective in character, dating back prior to the time of the injury, he may maintain his action.' 26 R. C. L. p. 958, par. 35.

"The title to this vein of coal was forfeited to the State in the year 1903, under Par. 29, chapter 31, of the Code, and the title to the same from that time until it was redeemed by the former owner, was vested in the State. The State held the title for what purpose? . . . The whole policy of the law,

including its many changes, seems to be that the State holds the title to the land, forfeited to it for any cause, solely for the payment of the taxes charged and chargeable thereon, and we may well say, as it is held by a long line of cases decided by this Court, that the former owner has no title to land forfeited to the State while the forfeiture exists, and before its redemption under the law, but that the title is held by it for the sole purpose of the payment of the taxes thereon; and when the title of the State is reinvested in the former owner by redemption thereof we are of the opinion and so hold, that the effect of said redemption and reinvestment is to transfer and assign to the former owner the right to institute any action for trespass on the land, the cause for which arose at any time during the forfeiture. That statute, which grants to the former owner the title vested in him before the forfeiture, makes his title retrospective in its nature, and entitles him to bring an action of trespass for acts committed while his title was vested in the state.

"Our statutes creating forfeiture of land to the State for any cause, and prescribing the proceedings by which it could or may collect the taxes thereon, have at all times recognized and granted to the former owner the privilege to redeem his land by filing a petition setting up his title and showing his right to redeem it. Acts 1872-73, Chap. 134; Acts 1882, Chap. 95, Par. 14; Acts 1885, Chap. 46; Acts 1887 Chap. 17; Acts 1891, Chap. 94; Acts 1893, Chap. 24 (Barne's Code 1923, Chap. 105, Par. 17). There has been no change in the statute by which the title passed to the State . . . .

"That the title to this coal was forfeited to the State for non-entry on the land books of Mineral County, and that the former owner, during the time

the title was so vested in the State, could not maintain an action of trespass for the taking and removal of the same, seems to be unquestioned. State vs. Central Pocahontas Coal Co., 82 W. Va. 230, 98 S. E. 214. This Court, in passing upon the effect of this statute in many cases, so holds. In the case of McClure vs. Maitland, 24 W. Va. 561, the court holds that 'The former owner, having no interest in the land or proceedings for its sale, is not entitled to be a party to the proceedings.'

"It seems to have been the purpose and intent of the legislature, viewed through all its acts and amendments, that when the former owner redeems his land he is entitled to receive not only his former title but the land itself as it was immediately before the title became vested in the State, and that he is reinvested not only with the same title he had before the forfeiture, but the right to institute an action of trespass, the cause of which arose while the title to the land was vested in the State, and the benefit of the constructive possession of the State at the time the trespass was committed is transferred to the former owner upon the redemption of his land and the reinvestment of his title. We, therefore, hold that the lower Court did not err in refusing to allow defendant's special plea setting up the forfeiture of this coal to be filed."

The Circuit Court sought to distinguish this decision from the instant case in that in West Virginia the State did not have full title, whereas "The rule controlling here (Louisiana) where the state after the expiration of a year has full title until redemption has occurred, is the same as that prevailing where property has been sold after the commission of a trespass thereon." (From Judge Hutcheson's opinion, citing a case of ordinary purchase.)

But that title *does* vest absolutely in West Virginia, even as in Louisiana, is apparent from *Early vs. Berry*, 115 W. Va. 105, 175 S. E. 331, (1934) wherein the Supreme Court of Appeals said:

> "It is quite true that this Court has held in several different cases that the sale to the State * * * *vests title to the land altogether and absolutely in the State.* * * * The right to redeem is a substantial equity, and a property right that exists as long as legal title remains in the State * * *. *The title of the redemptioner is retrospective in character and vests him with the right to sue for trespass occurring during the time of forfeiture.*" (Citing the Gerstell case).

It is respectfully submitted that this distinction by the Circuit Court is untenable, that in both West Virginia and Louisiana the State had full title subject to the right of redemption, and that to hold the same rule applicable to both redemption and sale is squarely conflicting with the *Johnson* case which must control here, and which clearly says that redemption relates back and restores the property as of the date of the sale, and that this is the same principle which impelled the West Virginia Court to its conclusion in the *Gerstell* case.

CONCLUSION.

It is respectfully urged that the great volume of tax-title litigation, frequently involving large sums, as here, makes of this an important question, and that the probable conflict between the opinion below and a local authority,

and the apparent conflict between that opinion and the only other case in which the precise question has been considered, makes a proper instance for the allowance of certiorari to the end that the matter may be thoroughly reviewed and authoritatively determined here.

Respectfully Submitted,

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WILLIAM S. LOVELL AND DOUGLAS GORDON LOVELL,

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Respondents and Cross-Petitioners.

CROSS-PETITION OF DULAC CYPRESS COMPANY, LTD., AND OF J. M. BURGUIERES COMPANY, LTD., FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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DULAC CYPRESS COMPANY, LTD., AND J. M. BURGUIERES COMPANY, LTD.,

Respondents and Cross-Petitioners.

CROSS-PETITION OF DULAC CYPRESS COMPANY, LTD., AND OF J. M. BURGUIERES COMPANY, LTD., FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your cross-petitioners, Dulac Cypress Company, Ltd., and J. M. Burguieres Company, Ltd., respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

An action was instituted by petitioners and cross-respondents, William S. Lovell and Douglas Gordon Lovell

(hereinafter referred to as "plaintiffs" for purposes of brevity), against respondents and cross-petitioners, Dulac Cypress Company, Ltd., and J. M. Burguieres Company, Ltd. (hereinafter referred to as "defendants" for purposes of brevity) in the United States District Court for the Eastern District of Louisiana (R. 1). The relief sought by the plaintiffs was two-fold: first, the recognition of their title to certain lands located in the Parish of Terrebonne, State of Louisiana; and second, damages in the amount of $24,000.00 for certain timber alleged to have been removed from said land by defendants. (R. 8, 9.) The jurisdiction of the Federal Courts was founded upon diversity of citizenship (R. 2, 3) and the requisite amount in controversy. (R. 8, 9.) The District Court denied plaintiffs' claim for damages (R. 79) and was sustained by the Circuit Court of Appeals for the Fifth Circuit (R. 126); hence the ruling on the question of damages is not sought to be reviewed by defendants. However, in regard to the question of title, the District Court (R. 79) rendered judgment in favor of plaintiffs which judgment was affirmed by the Circuit Court of Appeals. (R. 126.) It is to the affirmance of this ruling that defendants address themselves.

The plaintiffs' title is founded upon a tax sale to W. S. Lovell (their ancestor in title) made on April 30th, 1883, in the name of Quitman (R. 2-9). On June 8th, 1895, however, the property in question was adjudicated to the State of Louisiana for the taxes of 1894 (R. 63).

By Act 97 of 1890 the Atchafalaya Basin Levee District was created and all lands thereafter transferred to the

State at tax sales were donated to said Board (R. 63). That statute provided that, as to lands thereafter adjudicated to the State, within one year subsequent thereto the Auditor and Register of the State should, upon request, execute "proper instruments of conveyance" to the Board, which should be recorded in the parish wherein the property was situated and the title and possession would thereupon vest in the Board (R. 63, 82). A record in the State Auditor's office, who, at the time of said adjudication, had jurisdiction over tax lands (R. 63), bears a notation opposite the description of the Lovell lands "Atchafalaya Basin Levee District Fund" (R. 64, 71). According to the undisputed testimony in the case, this notation was considered by the proper State employees to mean that the lands therein described had been transferred to the Atchafalaya Basin Levee District (R. 64, 71).

On February 14th, 1912, the Register of the State Land Office (to whom at that time jurisdiction over tax lands had been transferred) executed an instrument dated February 14th, 1912, wherein he declared that he did "hereby certify that the records of the State Land Office show that the following described lands, which were sold to the State of Louisiana for the years enumerated, or assessments in the names of the parties stated, have been transferred to the Atchafalaya Basin Levee Board" under the Levee Board Act, said instrument describing the lands here in question (R. 72-73).

The Levee Board transferred said lands to defendants' ancestor in title (R. 21-22, 72) who in turn, transferred them to the defendants. (R. 66.) Defendants and their

ancestor in title have continued in the actual, physical possession of this property since 1903 or 1904 (R. 73).

On January 12th, 1938, plaintiffs, as the heirs of W. S. Lovell, redeemed the property from tax sale by paying all taxes not theretofore paid on the property and a certificate of redemption was issued and placed of record (R. 74). Plaintiffs then filed this proceeding basing their title upon the said tax sale to Lovell in 1883, and the redemption executed by the Register of the State Land Office on January 12th, 1938.

Defendants admitted the tax sale of 1895 and the execution of the certificate of redemption in 1938, but asserted that said redemption was illegal, null, void and of no effect in that the State had donated this property to the Board of Commissioners of the Atchafalaya Basin Levee District by Act 97 of 1890, and that the instrument of February 14, 1912, executed by the Register, had the effect of transferring the lands to the Levee Board (R. 35); and in connection with this instrument pleaded Act 316 of 1926 of the Louisiana Legislature, which confirmed conveyances signed by either the Auditor or the Register (R. 37); or, in the alternative, alleged that if it did not, then that a conveyance had been executed by the Register and the Auditor which had been lost (R. 35-36). Defendants further averred that they and their immediate ancestors in title had held possession for more than thirty years and pleaded prescription of ten and thirty years *acquirendi causa* provided for by the laws of Louisiana (R. 20-21). The defendants also pleaded the prescription of six years provided for by Louisiana Act 62 of 1912,

which they contended barred any attack upon the conveyance by the Levee Board to defendants' ancestor in title. (R. 40-41.)

The District Court held that the tax sale in the name of Lovell made on June 8, 1895, vested the State with absolute title to the property (R. 76); that defendants had failed to show that a conveyance to the Levee Board had been made in the manner provided by Act 97 of 1890 (R. 75-76); that Act 237 of 1924 repealed that part of Act 97 of 1890 which authorized the Levee Board to demand the conveyance of title to lands acquired by the State at tax sale (R. 76); that plaintiffs were legally entitled to redeem the lands in 1938 (R. 76); and that in view of the fact that the State held the absolute title to the property prescription of ten and thirty years *acquirendi causa* could not be maintained as prescription did not run against the State (R. 77).

Both plaintiffs and defendants appealed from the judgment of the District Court to the Circuit Court of Appeals for the Fifth Circuit. (R. 106, 107.) The Circuit Court of Appeals affirmed the District Court on all particulars. (R. 126.)

The defendants applied for a rehearing, (R. 127) showing that the Court erred in holding that no transfer had been made by the State to the Levee Board; in holding that the case of *State ex rel. Fitzpatrick v. Grace*, 187 La. 1028, 175 So. 656, was decisive of the question of title in this case; and in failing to sustain the various pleas of prescription. (R. 128.) The defendants also called the

attention of the Court to the fact that a suit entitled *"Wm. S. Lovell et als. v. Andrew Fitzpatrick, et als."*, No. 11,193 of the Docket of the 17th Judicial District Court of Louisiana for the Parish of Terrebonne, was then pending, wherein the plaintiffs in this action were seeking to be recognized as owners of other lands contained in the same tax adjudication as involved in the instant case. (R. 129.) The defendants then showed that a decision in said state court case would decide the issue of title involved in this case and would be followed by the Federal courts, and that under such circumstances no final decree in this cause should be rendered until a final determination of the said state court suit. (R. 129.) The Court of Appeals however refused the rehearing and its judgment became final. (R. 140.) Since that date a decision has been rendered in the said cause No. 11,193 decreeing that the instrument executed by the Register of the State Land Office, dated February 14, 1912, which is the same instrument as the instrument here in question, constituted a proper transfer from the State to the Levee Board, and rejected the plaintiffs' claim of title to the lands.

The plaintiffs have filed a petition for certiorari in this Honorable Court for the purpose of securing a review by the Court on the question of damages. Defendants now file this, their cross-petition, in order to secure a review on the question of title.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended

(Act of March 3, 1891, c. 517, §6, 26 Stat. 828; as re-enacted by Act of March 3, 1911, c. 231, §240, 36 Stat. 1157; as amended by Act of Feb. 13, 1925, c. 229, §1, 43 Stat. 938) U. S. C. tit. 28, §347 (a). This cross-petition is presented within the proper time, the judgment of the Circuit Court of Appeals for the Fifth Circuit having been entered on January 14, 1941 (R. 114) and a petition for rehearing, which was timely filed, having been denied on February 12, 1941. (R. 140.)

III.

QUESTIONS PRESENTED.

The questions presented by this petition are the following:

1. Did the Circuit Court of Appeals for the Fifth Circuit err in holding that the evidence in this cause, and particularly the instrument signed by the Register of the State Land Office, dated February 14, 1912, and the notation on the Auditor's record, "Atchafalaya Basin Levee District Fund", did not evidence a proper conveyance to the Board of Commissioners for the Atchafalaya Basin Levee District from the State of Louisiana, and in not holding that such conveyance inured to the benefit of defendants?

2. Did the Court err in holding that the case of *State ex rel. Fitzpatrick v. Grace*, 187 La. 1028, 175 So. 656, was decisive of the issue of title in this cause and in applying the doctrine of that case to the one at bar?

3. Did the Court err in failing to sustain the pleas of prescription of ten and thirty years *acquirendi causa* filed by defendants in support of their title and in bar of plaintiffs' demand, and in failing to reverse the judgment and decree of the District Court in this respect?

4. Did the Court err in failing to sustain the plea of prescription of six years filed by defendants based on Act 62 of 1912?

5. Did the Court err in entering a final judgment and denying a rehearing in this cause after its attention had been called to the pendency of a state court suit a final decision in which would be binding upon the Federal Courts and would be determinative of the issues involved herein; and, if not, should This Honorable Court postpone any decision hereon, in order to prevent a conflict between the decisions of the State and Federal courts, until a final adjudication has been had in the state court (whether said final adjudication is by judgment on appeal or by permitting the decision of the lower court to become unappealable)?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. In deciding that prescription does not run against a tax debtor after a tax adjudication to the State and while the property is in the State, it is believed that the Circuit Court of Appeals decided incorrectly a question of great importance affecting a large number of land titles in this State and affecting the public generally.

Reasons for the incorrectness of said decision are stated in the vigorous dissenting opinion of Circuit Judge Sibley, filed herein. (R. 123.)

2. In deciding that this case is governed by the case of *State ex rel. Fitzpatrick v. Grace,* 187 La. 1028, 175 So. 656, it is believed that the Circuit Court of Appeals has incorrectly given that very important case an interpretation which may extend its scope to cases not originally contemplated in said decision, thereby affecting adversely a number of land titles in this State.

3. In deciding that the instrument executed by the Register dated February 14, 1912, and the notation shown on the Auditor's record, does not operate as a valid conveyance to the Levee Board, it is believed that the Circuit Court of Appeals has decided incorrectly a question which may invalidate many land titles in which such items are involved.

4. The decision of the Circuit Court of Appeals is directly in conflict with the decision of the 17th Judicial District Court for the Parish of Terrebonne, State of Louisiana, in regard to the issue of title raised herein. Should plaintiffs in that suit (who are also plaintiffs in this suit) appeal from said judgment of the lower court, the questions at issue here will be passed upon by the Supreme Court of Louisiana, whose final ruling will be binding on the Federal Courts, and which ruling, it is believed will be directly contrary to that of the Court of Appeals herein. On the other hand, should no appeal be taken by the plaintiffs in said state court suit, and should they permit said judgment to become final against them, then it is believed that said state court decision

would be binding on the Federal Courts as being the final and only expression of the state law on the subject. In addition, plaintiffs in this suit, through the accident of federal jurisdiction alone, will be permitted to recover upon a claim in the Federal Court upon which it could not recover in the state court. Accordingly, unless this Court grants certiorari for one of the foregoing reasons, it seems probable that the only way to prevent a conflict between the State and Federal decisions would be for this Court to postpone any decision herein until such time as a final adjudication is had in the state courts.

Wherefore, your respondents and cross-petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the above numbered and entitled case, and that the said decree of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court insofar as same decrees title to the property in question to rest in William S. Lovell and Douglas Gordon Lovell and for such other and further relief in the premises, both legal and equitable, as to this Honorable Court may seem meet and just.

ROBERTS C. MILLING,
Attorney for Cross-Petitioners.

HAYWOOD H. HILLYER, JR.,
Of Counsel.